Supreme Court, U.S.
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No. 00-996

In The

Supreme Court of the United States

ASHER RUBINSTEIN,

Cross-Petitioner,

v.

ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND,
PAUL MICHAEL LYNCH,
AND WILLIAM C. VAN BUSKIRK,

Cross-Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner Asher Rubinstein submits this reply to Tulane's opposition to his conditional cross-petition for writ of certiorari. For ease of reference, this reply uses the same headings as the cross-petition.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS CONTINUES, EVEN AFTER *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, TO ARROGATE UNTO ITSELF THE ROLE OF THE JURY IN EMPLOYMENT DISCRIMINATION CASES.

Much of Tulane's opposition is spent arguing the facts. But the problem here, as set out in the conditional cross-petition, is that the Fifth Circuit, even after *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), is resolving such factual arguments itself rather than leaving those to juries.

Tulane argues at length that Professor Rubinstein was denied promotions and raises because he had low student evaluations, was a poor university citizen, and already was well-paid. Op. Cross-Cert. at 3-11. But the contention that he already was well-paid was never proffered during the summary judgment phase as a reason for these adverse actions. *See* the appendix to the petition for writ of certiorari in *Administrators of the Tulane Educational Fund v. Rubinstein*, No. 00-789 at 70a ("pet. app."). As for the other reasons, the Fifth Circuit pointed out that "[t]he

District Court found some evidence of pretext, specifically with regard to Rubinstein's purported lack of university citizenship." Pet. App. 11a. The District Court itself said:

> [A] reasonable jury could find that defendants' proffered legitimate non-discriminatory reasons – plaintiff's poor relations with students and failure to mentor students – were not credible. Accordingly, plaintiff has presented evidence from which a reasonable jury could find that these proffered reasons for denying plaintiff the benefits he sought – that plaintiff's university citizenship and student relations were low – were pretextual.

Pet. App. 75a.

Under this Court's decisions, this pretext generally is enough for a jury to conclude that all of the employer's reasons are contrived.

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296 (1992).

Reeves, 120 S.Ct. at 2108.

Moreover, while Tulane cites the student evaluations,[1] the Fifth Circuit noted that Professor Rubinstein's tenure recommendation stated he was a "satisfactory teacher," and that there was evidence that his supervisors had tampered with and altered student evaluations to stack the deck against him. Pet. App. 2a-3a, 12a. As this Court stated in *Reeves*, a "suspicion of mendacity" can lead a jury to conclude that discrimination was at work rather than the employer's stated reasons. 120 S.Ct. at 2108.

In addition, Tulane's proffered reasons are contradicted by the explicit remarks of Tulane decisionmakers indicating that they may have been motivated by religion and national origin. Dean William Van Buskirk told Professor Rubinstein that Department Chair Paul Michael Lynch may well have denied Rubinstein a raise because Rubinstein is Russian and Jewish. After Rubinstein was given the lowest raise in the department in 1994, Van Buskirk said: "what are you going to do, sue me? Do you know what happens to people who sue their employer?" Professor Watts made anti-semitic remarks, and also called Rubinstein a "Russian Yankee" and a "commie." Professor Bruce told another professor that if "the Russian Jew" could obtain tenure, anyone could. Pet. App. 11a-13a, 16a-17a. The comments by all of these decisionmakers create a factual issue as to whether national origin

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[1] Tulane emphasizes that Rubinstein's five year student evaluation average is in the bottom third of the Engineering School. Tulane does not mention that Rubinstein's scores were better than American-born Dr. Kirk Bundy, who was promoted to full professor. R. 4, 719, 761, 895 & 896.

and religion motivated the treatment of Professor Rubinstein, not the reasons given by Tulane.

Unfortunately, the Fifth Circuit made the same mistake in this case that it did in *Reeves*. It "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." 120 S.Ct. at 2111. As in *Reeves*, the Fifth Circuit erred here, and this Court granted certiorari to correct this recurring problem.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE IF THE FIFTH CIRCUIT'S "STRAY REMARKS DOCTRINE" SURVIVES THIS COURT'S DECISION IN *REEVES*.

Tulane argues that the Fifth Circuit's reliance upon its "stray remarks" doctrine was simply an alternative holding that was nothing more than dictum. Op. Cross-Cert. at 15-16. But that is simply wrong.

As this Court has made clear, once a prima facie case is made, and once the defendant presents evidence of proffered reasons, all presumptions disappear "and the sole remaining issue [is] discrimination vel non." *Reeves*, 120 S.Ct. at 2106 (internal quotations omitted). Proof of pretext is "one form of circumstantial evidence that is probative of intentional discrimination," *id.* at 2108, and another form is direct evidence of discrimination through discriminatory remarks. *Id.* at 2111. Here, as mentioned earlier, the plaintiff not only presented evidence of pretext, but also of discriminatory comments by decision-makers.

But the Fifth Circuit completely discounted the evidence of discriminatory comments because of its "stray remarks" doctrine.

> In this case, Rubinstein fails to offer evidence that the comments he complains of are either proximate in time to his failure to receive raises or promotions, or that the comments are related to the employment decisions at issue. The only evidence he offers is that the comments were, in fact, made. Our careful review of the record indicates that these comments are best reviewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment. Summarized, our careful review of all the summary judgment evidence presented, viewed in the best light to the non-movant's claims, mandates the conclusion that the evidence taken together does not raise a legitimate fact issue as to discriminatory intent with respect to Rubinstein's discrimination claims.

Pet. App. 13a-14a. Thus, the "stray remarks" doctrine, used to nullify the discriminatory statements of decision-makers, was not dictum, but instead was an integral part of the Fifth Circuit's holding preventing the submission of the discrimination claims to a jury. As discussed in our conditional cross-petition, this Fifth Circuit doctrine is subject to question after this Court's decision in *Reeves*, and this Court should grant certiorari to decide if it survives *Reeves*.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT ISSUES REGARDING JUDICIAL REVIEW OF PUNITIVE DAMAGE VERDICTS BY JURIES THAT ARE RAISED BY THIS CASE.

Tulane argues first that under *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), Professor Rubinstein's response to the District Court's order implementing the Fifth Circuit's decision, requiring him to choose between the remittitur or a new trial, precludes any review by this Court on certiorari. For the reasons stated in footnote 1 of our conditional cross-petition, the punitive damages issues raised by the cross-petition are not foreclosed. At the very least, this Court should grant the cross-petition and decide the matter after briefing and argument, determining if its consideration of a Court of Appeals remittitur is precluded simply because the plaintiff chooses the lesser of two evils in response to a district court order on remand.[2]

Tulane next contends that if its petition for certiorari is granted, Rubinstein's claims regarding the Fifth Circuit's remittitur "are moot." Op. Cross-Cert. at 17. But

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[2] Not only does Tulane argue "that Rubinstein has waived the right to raise any issue concerning punitive damages" but also concerning "the right to a new trial or any other issue presented in his conditional cross-petition for certiorari." Op. Cross-Cert. at 17. But that makes no sense. Professor Rubinstein never had a trial on his discrimination claims. The decision he made on remand regarding the punitive damages remittitur relating to the retaliation claim in no way forecloses him from contending that he should be granted a trial on the separate discrimination claims.

they are moot only if Tulane wins on the merits. If not, Rubinstein's issues remain alive. Thus, if Tulane's petition is granted, the cross-petition should be granted as well.

With respect to the Fifth Circuit's failure to include the 3.5% pay raise award in calculating the damages against which the ratio of a punitive award is to be measured, Tulane argues that "no additional harm [is] likely to result" to Rubinstein because he has, in fact, been awarded the pay raise. Op. Cross-Cert. at 18. But that does not matter. The proper calculation considers not only compensatory damages, but also "the harm to the victim that would have ensued *if the tortious plan had succeeded.*" *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581 (1996) (emphasis added).

Tulane also contends that the ten year period used to measure this likely harm "is unfounded." Op. Cross-Cert. at 18. But the figure is based on record evidence cited in the conditional cross-petition and is simply illustrative of the fact that the ratio of punitive damages to the actual harm in the case is much less than the 30 to one ratio relied upon by the Court of Appeals to override the jury's punitive damage verdict.

Amazingly, Tulane claims that "*Rubinstein* has failed as a matter of law to prove that Tulane is even liable, much less that Tulane's actions were reprehensible, malicious, or recklessly indifferent. . . . " Op. Cross-Cert. at 19. But as the Fifth Circuit held, Tulane's actions "demonstrate a high degree of reprehensibility. . . . " Pet. App. 30a.

Finally, Tulane noted the Fifth Circuit's statement that Rubinstein failed in that Court to take a position on whether, if the punitive award was reduced, the Fifth Circuit should itself specify the remittitur amount or remand to the District Court to decide the matter. Pet. App. 29a. But that in no way forecloses Rubinstein from challenging the Fifth Circuit's utilization in the first place of a de novo standard of review in upholding Tulane's challenge to the jury's punitive verdict. That is the same issue upon which this Court granted certiorari in *Cooper Industries v. Leatherman Tool Group, Inc.*, No. 99-2035, and it also is squarely presented here.

CONCLUSION

For the foregoi..g reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Fifth Circuit in this case.

Respectfully submitted,

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